

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No. : 10/757,813
Inventor(s) : Donald C. Roe, et al.
Filed : January 15, 2004
Art Unit : 3761
Examiner : Michele M. Kidwell
Docket No. : 7294C
Confirmation No. : 5408
Customer No. : 27752
Title : Article Having Improved Fecal Storage Structure

APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

This Brief is filed pursuant to the appeal from the decision communicated in the Office Action mailed on July 19, 2010.

A timely Notice of Appeal was filed on October 18, 2010, making this Brief due on or before December 20, 2010 (as December 18, 2010 falls on a Saturday).

REAL PARTY IN INTEREST

The real party in interest is The Procter & Gamble Company of Cincinnati, Ohio.

RELATED APPEALS AND INTERFERENCES

There are no known related appeals, interferences, or judicial proceedings.

STATUS OF CLAIMS

Claims 1-3, 6-7, 10-11, 16-17 and 19-23 are rejected.

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Claims 4-5, 8-9, 12-15 and 18 were canceled.

Claims 1-3, 6-7, 10-11, 16-17 and 19-23 are appealed.

A complete copy of the appealed claims is set forth in the Claims Appendix attached herein.

STATUS OF AMENDMENTS

No amendment was filed.

SUMMARY OF CLAIMED SUBJECT MATTER

Claim 1 is directed to a disposable absorbent article (20) for wearing on or about a lower torso of a wearer for receiving bodily exudates, the disposable absorbent article (20) comprising a topsheet (24); a backsheet (26); an absorbent core (28) disposed between at least a portion of the topsheet (24) and the backsheet (26) (page 6, lines 16-23); an acceptance element (150) (page 20, lines 30-35), wherein the acceptance element (150) comprises one or more apertures each having an effective aperture size of between about 0.2 square mm to about 25 square mm (page 23, lines 19-25); a fecal storage element (152) disposed between at least a portion of the acceptance element (150) and the absorbent core (28), wherein the fecal storage element (152) has a compressive resistance of at least about 70% (page 29, lines 8-24), wherein the fecal storage element (152) comprises a macro-particulate structure (170) comprising a multiplicity of particles (172) (page 27, lines 21-24), and wherein the acceptance element (150) is disposed between at least a portion of the topsheet (24) and a portion of the fecal storage element (152) (page 25, line 8 – page 26, line 21); and an immobilization element (154) configured to retain bodily exudates (page 31, line 34 – page 32, line 15); wherein the topsheet (24), the backsheet (26), the absorbent core (28), the acceptance element (150), and the fecal storage element (152) are all separate elements from each other that are joined to define the article (20) (page 21 lines 18-24; page 26, line 4-

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27) (*inter alia* specification, pages 1-53; Figures 1, 2, 3, 4, 5, 6, 6A, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22).

Claim 10 is directed to a disposable absorbent article (20) for wearing on or about a lower torso of a wearer for receiving bodily exudates, the disposable absorbent article (20) comprising a liquid pervious topsheet (24); a liquid impervious backsheet (26); an absorbent core (28) disposed between at least a portion of the liquid pervious topsheet (24) and the liquid impervious backsheet (26) (page 6, lines 16-23); an acceptance element (150) (page 20, lines 30-35) wherein the acceptance element (150) has an effective open area of at least 30% (page 23, lines 8-17); a fecal storage element (152) disposed between at least a portion of the acceptance element (150) and the absorbent core (28), wherein the fecal storage element (152) has a compressive resistance of at least about 70% (page 29, lines 8-24), wherein the fecal storage element (152) comprises a macro-particulate structure (170) comprising a multiplicity of particles (172) (page 27, lines 21-24), and wherein the acceptance element (150) is disposed between at least a portion of the topsheet (24) and a portion of the fecal storage element (152) (page 25, line 8 – page 26, line 21); and an immobilization element (154) (page 31, line 34 – page 32, line 15); wherein the topsheet (24), the backsheet (26), the absorbent core (28), the acceptance element (150), the immobilization element (154), and the fecal storage element (152) are all separate elements from each other that are joined to define the article (20) (page 21 lines 18-24; page 26, line 4-27) (*inter alia* specification, pages 1-53; Figures 1, 2, 3, 4, 5, 6, 6A, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22).

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

The following grounds of rejection are submitted for consideration on Appeal by the Board:

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- I. Rejection of Claims 1-3, 6-7, 10-11, 16-17 and 19-23 under 35 U.S.C. §103(a) as being unpatentable over Thompson, et al., Kimberly-Clark, Ahr, et al., Radel et al., Moore et al., and Lash et al. is erroneous.

ARGUMENTS

- I. **Claims 1-3, 6-7, 10-11, 16-17 and 19-23 are patentable over Thompson, et al., Kimberly-Clark, Ahr, et al., Radel et al., Moore et al., and Lash et al. because the references do not teach or suggest all of the claim limitations.**

Claims 1-3, 6-7, 10-11, 16-17 and 19-23 have been rejected under 35 U.S.C. §103(a) as being unpatentable over Thompson, et al., (US 5,281,208) (and thereby, by incorporation, Thompson (US 3,929,135)), Kimberly-Clark EP (EP 0215417), Ahr, et al. (US 4,463,045), (and thereby, by incorporation, Radel, et al. (US 4342,314)), Moore, et al. (US 4,898,642) and Lash, et al. (US 4,935,022).

It is Office policy to follow *Graham v. John Deere Co.*, 383 U.S. 1; 148 U.S.P.Q. 459 (1966), in the consideration and determination of obviousness under 35 U.S.C. § 103. See *MPEP* § 2141. A determination of obviousness under § 103 requires the determination of the following factual inquiries: (1) determining the scope and content of the prior art; (2) ascertaining the differences between the prior art and the claims at issue; (3) resolving the level of ordinary skill in the pertinent art; and (4) evaluating evidence of secondary considerations, if any. Further, “[a]ll words in a claim must be considered in judging the patentability of that claim against the prior art.” *In re Wilson*, 424 F.2d 1382, 1385; 165 U.S.P.Q. 494, 496 (C.C.P.A. 1970), see also, *MPEP* §2143.03 (emphasis added). Further still, in formulating a rejection under § 103(a), the Office must identify a rational basis why a person of ordinary skill in the art would have combined or modified the prior art elements in the manner claimed. See *MPEP* § 2141; *KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398, 418; 82 U.S.P.Q.2d 1385 (2007) (hereinafter “*KSR*”) (a patent examiner must provide “an apparent reason to combine the known elements in the fashion claimed by the patent at issue.

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To facilitate this review, this analysis *should be made explicit.*” (Emphasis added.); *In re Kahn*, 441 F.3d 977, 988; 78 U.S.P.Q.2d 1329 (Fed. Cir. 2006) (cited with approval in *KSR*) (“[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.”)

In *KSR*, all elements of the claims were present in the prior art. In discussing the District Court’s analysis, the Supreme Court in *KSR* stated:

Following *Graham*’s direction, the court compared the teachings of the prior art to the claims of Engelgau. It found “little difference.” 298 F.2d at 590. Asano taught everything contained in claim 4 except the use of a sensor to detect the pedal’s position and transmit it to the computer controlling the throttle. That additional aspect was revealed in sources such as the ‘068 patent and the sensors used by Chevrolet.

As such, the Supreme Court in *KSR* only considered what analysis was proper in making a combination of known prior art elements (i.e., all elements were provided in the prior art). The *KSR* Court did not overrule the “all elements” rule in a 35 U.S.C. §103 context. Therefore, in order to establish a *prima facie* case of obviousness and make a legally sufficient obviousness rejection, an Examiner still has the burden of establishing that all elements of a claim are found in the prior art.

Further, in two recent post-*KSR* cases, the United States Court of Appeals for the Federal Circuit applied the *all elements rule* when considering obviousness and, only after the all elements rule was satisfied, determined if there was a motivation to combine the known prior art elements using the analysis set forth in *KSR*. See *Ball Aerosol and Specialty Container, Inc. v. Limited Brands, Inc.*, 555 F.3d 984; 89 U.S.P.Q.2d 1870 (2009) and *Fresenius USA, Inc. v. Baxter International, Inc.*, 2009 U.S. App. LEXIS 20155; 92 U.S.P.Q.2d 1163 (Fed. Cir. 2009). Accordingly, a legally sufficient examination of the pending claims of the Subject Application requires that the Examiner first locate *all of the elements* in the prior art and then, only if all elements are located, conduct an analysis to

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determine if the known elements can legally be combined using the guidelines provided by *KSR*. Further, it remains appropriate for a *post-KSR* court considering obviousness to determine whether there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue. *Fresenius USA, Inc. v. Baxter International, Inc.*, 2009 U.S. App. LEXIS 20155; 92 U.S.P.Q. 2D 1163 (Fed. Cir. 2009). In a recent case, the Federal Circuit stated that “[a] patent composed of several elements is not proved obvious merely by demonstrating that *each of its elements* was, independently, known in the prior art.” *In re Richard P. Mettke*, 570 F.3d 1356, 1360 (Fed. Cir. 2009) citing *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. at 418 (emphasis added). Additionally, in determining the differences between the prior art and the claims, the question under 35 U.S.C. § 103 is not whether the differences themselves would have been obvious, but whether the claimed invention as a whole would have been obvious. *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 218 U.S.P.Q. 871 (Fed. Cir. 1983); *Schenck v. Nortron Corp.*, 713 F.2d 782, 218 U.S.P.Q. 698 (Fed. Cir. 1983); and *MPEP* § 2141.02(I).

Appellants respectfully submit that the references cited in the Office Action of July 19, 2010, either alone or in combination, do not disclose or suggest all of the elements of Independent Claims 1 and 10. Appellants further respectfully submit that the Office Action of July 19, 2010 has not provided legally sufficient apparent reasons to combine the references.

Appellants respectfully submit that none of the references cited in the Office Action of July 19, 2010, either alone or in combination, disclose or suggest *all of the elements* of Independent Claims 1 and 10. In fact, the references cited in the Office Action do not disclose or suggest a disposable absorbent article comprising: (1) a topsheet; (2) a backsheet; (3) an absorbent core; (4) an acceptance element; (5) a fecal storage element; and (6) an immobilization element, especially such a disposable absorbent article having the features recited in Independent Claims 1 and 10. As some examples, the references do not disclose or suggest “a fecal storage element disposed between at least a portion of the acceptance

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element and the absorbent core,” “an acceptance element is disposed between at least a portion of the topsheet and a portion of the fecal storage element,” and “the fecal storage element comprises a macro-particulate structure comprising a multiplicity of particles.” At least in view of the foregoing, the Office Action of July 19, 2010 has *not* provided *all elements* of Independent Claims 1 and 10.

Further to the above, Independent Claim 1 recites, in part, “an acceptance element, wherein the acceptance element comprises one or more apertures each having an effective aperture size of between about 0.2 square mm to about 25 square mm.” The Office Action of July 19, 2010 states, on page 6, that “the *topsheet* of Thompson et al comprises or obviously comprises (Note MPEP 2131.03 and 2144.05) at least one aperture having an area of between 0.2 sq. mm to 25 sq. mm, e.g., apertures of equal size of such area, for enhanced acceptance of fluid.” (Emphasis added.) Independent Claim 1, however, recites that the *acceptance element* and *not the topsheet* comprises the above-referenced features. Furthermore, Independent Claim 1 specifically claims a “topsheet” as another element of the claim. As a result, the Office Action of July 19, 2010 has *not* provided *all elements* of Independent Claim 1 because the *topsheet* referenced by the Office Action is respectfully not the same as the claimed *acceptance element*.

Additionally, neither Thompson ‘208 nor any other references cited in the Office Action of July 19, 2010 disclose or suggest a fecal storage element, as recited in Independent Claims 1 and 10. Thompson ‘208, referring to Fig. 7, instead discloses a topsheet 9, a secondary topsheet 10, a fluid retaining core 11, and a fluid impervious backsheet 12. The purpose of the secondary topsheet 10 comprising capillary channel fibers therein is to promote fluid flow into the fluid retaining core 11 (i.e., absorbent core). See Thompson ‘208, col. 7, lines 57-62 and col. 8, lines 53-65. Figs. 8A and 8B of Thompson ‘208 comprise a similar configuration. Appellants respectfully note that the secondary topsheets of Thompson ‘208 are *simply not, and do not function as*, fecal storage elements disposed between at least a portion of the acceptance element and the absorbent core, wherein the fecal

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storage elements have a compressive resistance of at least about 70%, and wherein the fecal storage elements comprises a macro-particulate structure comprising a multiplicity of particles, as recited in Independent Claims 1 and 10. As a result, the Office Action of July 19, 2010 has *not* provided *all elements* of Independent Claims 1 and 10.

Appellants respectfully submit that the Office Action's apparent reasons for combining the various references are legally insufficient. The Office Action states:

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to employ a compressive resistance of at least about 70% on the Thompson et al device *since it has been held that where the general conditions of a claim are disclosed in the prior art as in the instant case*, i.e. see discussion supra, *it is not inventive to discover the optimum or workable ranges by routine experimentation*. In re Aller, 105 USPQ 233. (Office Action of July 19, 2010, page 5, emphasis added).

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to employ an effective aperture size as claimed on the Thompson et al device, if not already, *since it has been held that where the general conditions of a claim are disclosed in the prior art as in the instant case*, i.e. see discussion supra, *it is not inventive to discover the optimum or workable ranges by routine experimentation*. In re Aller, 105 USPQ 233. (Office Action of July 19, 2010, page 7, emphasis added).

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to employ a storage element as claimed on the Thompson et al device, if not already, *since it has been held that where the general conditions of a claim are disclosed in the prior art as in the instant case*, i.e. see discussion supra, *it is not inventive to discover the optimum or workable ranges*, i.e. the claimed range of viscosity, *by routine experimentation*. In re Aller, 105 USPQ 233. (Office Action of July 19, 2010, page 8, emphasis added).

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Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to employ an effective open area of at least about 30% on the Thompson et al device, if not already, *since it has been held that where the general conditions of a claim are disclosed in the prior art as in the instant case*, i.e. see discussion supra, *it is not inventive to discover the optimum or workable ranges by routine experimentation*. In re Aller, 105 USPQ 233. (Office Action of July 19, 2010, page 10, emphasis added).

Appellants respectfully submit that the above-referenced “apparent reasons” provided in the Office Action of July 19, 2010 are legally insufficient under *KSR*. First, the Office Action makes no explicit analysis of *why* someone of ordinary skill in the art would combine the references cited in the Office Action in the fashion combined by the Examiner, as specifically required by *KSR*. Second, “[r]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.”) *In re Kahn*, 441 F.3d 977, 988; 78 U.S.P.Q.2d 1329 (Fed. Cir. 2006) (cited with approval in *KSR*).

The Office Action’s “apparent reasons” rely heavily on *In re Aller* in an attempt to render obvious the various features recited in the claims. 220 F.2d 454; 105 U.S.P.Q. 233 (CCPA 1955). However, the references cited in the Office Action of July 19, 2010 do not disclose or suggest such features. In fact, most of the Office Action’s arguments merely argue that such features and/or parameters are inherent in the teachings of the references cited in the Office Action. Such arguments are respectfully not sufficient to sustain an obviousness rejection under *KSR*. Further, *In re Aller* stands for the proposition that “[w]here the general conditions of a claim *are disclosed* in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation.” 220 F.2d 454, 456, 105 U.S.P.Q. 233, 235 (CCPA 1955) (Emphasis added). In this instance, the Office Action of July 19, 2010 has failed to establish that the general conditions of the pending claims are disclosed or suggested in the references cited in the Office Action and, therefore, Appellants

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respectfully submit that *In re Aller* is not applicable to the claims of the Subject Application. In addition, the "apparent reasons" of the Office Action of July 19, 2010 acknowledge, at least to some extent, that the prior art does not disclose or suggest all elements of Independent Claims 1 and 10 and merely state that such claimed features would be obvious.

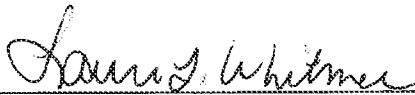
In view of the foregoing, Appellants respectfully submit that the Office Action of July 19, 2010 has not established a legally sufficient case of obviousness under 35 U.S.C. § 103(a), as the Office Action of July 19, 2010 does not provide all elements of Independent Claims 1 and 10, and the Office Action of July 19, 2010 does not provide legally sufficient apparent reasons to combine the references cited in the Office Action of July 19, 2010. Therefore, Appellants respectfully request withdrawal of all of the rejections in the Office Action of July 19, 2010 and allowance of all pending claims.

SUMMARY

In view of all of the above, it is respectfully submitted that the rejections of Claims 1-3, 6-7, 10-11, 16-17 and 19-23 are erroneous and should be reversed.

Respectfully submitted,

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CLAIMS APPENDIX

1. A disposable absorbent article for wearing on or about a lower torso of a wearer for receiving bodily exudates, the disposable absorbent article comprising:
 - a topsheet;
 - a backsheet;
 - an absorbent core disposed between at least a portion of the topsheet and the backsheet;
 - an acceptance element, wherein the acceptance element comprises one or more apertures each having an effective aperture size of between about 0.2 square mm to about 25 square mm;
 - a fecal storage element disposed between at least a portion of the acceptance element and the absorbent core, wherein the fecal storage element has a compressive resistance of at least about 70%, wherein the fecal storage element comprises a macro-particulate structure comprising a multiplicity of particles, and wherein the acceptance element is disposed between at least a portion of the topsheet and a portion of the fecal storage element; and
 - an immobilization element configured to retain bodily exudates;wherein the topsheet, the backsheet, the absorbent core, the acceptance element, and the fecal storage element are all separate elements from each other that are joined to define the article.
2. The disposable absorbent article of claim 1, wherein the acceptance element has an effective open area of at least 30%.
3. The disposable absorbent article of claim 1, wherein the topsheet is selected from the group consisting of: a porous foam, a reticulated foam, an apertured plastic film, a

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woven web of natural fibers, a nonwoven web of synthetic fibers, a woven web comprising natural and synthetic fibers, and a nonwoven web comprising natural and synthetic fibers.

6. The disposable absorbent article of claim 1, wherein the particles are absorbent.
7. The disposable absorbent article of claim 1, wherein the particles are non-absorbent.
10. A disposable absorbent article for wearing on or about a lower torso of a wearer for receiving bodily exudates, the disposable absorbent article comprising:
 - a liquid pervious topsheet;
 - a liquid impervious backsheet;
 - an absorbent core disposed between at least a portion of the liquid pervious topsheet and the liquid impervious backsheet,
 - an acceptance element wherein the acceptance element has an effective open area of at least 30%;
 - a fecal storage element disposed between at least a portion of the acceptance element and the absorbent core, wherein the fecal storage element has a compressive resistance of at least about 70%, wherein the fecal storage element comprises a macro-particulate structure comprising a multiplicity of particles, and wherein the acceptance element is disposed between at least a portion of the topsheet and a portion of the fecal storage element; and
 - an immobilization element;wherein the topsheet, the backsheet, the absorbent core, the acceptance element, the immobilization element, and the fecal storage element are all separate elements from each other that are joined to define the article.

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11. The disposable absorbent article of claim 10, wherein the liquid pervious topsheet is selected from the group consisting of: a porous foam, a reticulated foam, an apertured plastic film, a woven web of natural fibers, a nonwoven web of natural fibers, a woven web of synthetic fibers, a nonwoven web of synthetic fibers, a woven web comprising natural and synthetic fibers, and a nonwoven web comprising natural and synthetic fibers.
16. The disposable absorbent article of claim 10, wherein the particles are absorbent.
17. The disposable absorbent article of claim 10, wherein the particles are non-absorbent.
19. The disposable absorbent article of claim 1, wherein the particles have a nominal size of between about 2 mm and about 16 mm.
20. The disposable absorbent article of claim 1, wherein the immobilization element is disposed between at least a portion of the fecal storage element and the absorbent core.
21. The disposable absorbent article of claim 1, wherein the immobilization element is configured to retain greater than about 7.5g of bodily exudates.
22. The disposable absorbent article of claim 10, wherein the immobilization element is disposed between at least a portion of the fecal storage element and the absorbent core.
23. The disposable absorbent article of claim 10, wherein the immobilization element is configured to retain greater than about 7.5g of bodily exudates.

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EVIDENCE APPENDIX

None.

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RELATED PROCEEDINGS APPENDIX

None.